

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7089

ORIGINAL

To be argued by:

TIMOTHY A. HANAN

6-3

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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THE CONTINENTAL INSURANCE COMPANY,

Plaintiff-Appellant,

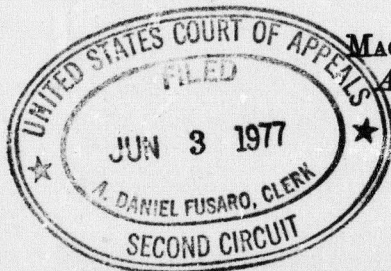
—against—

HERSENT OFFSHORE, INC.,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT



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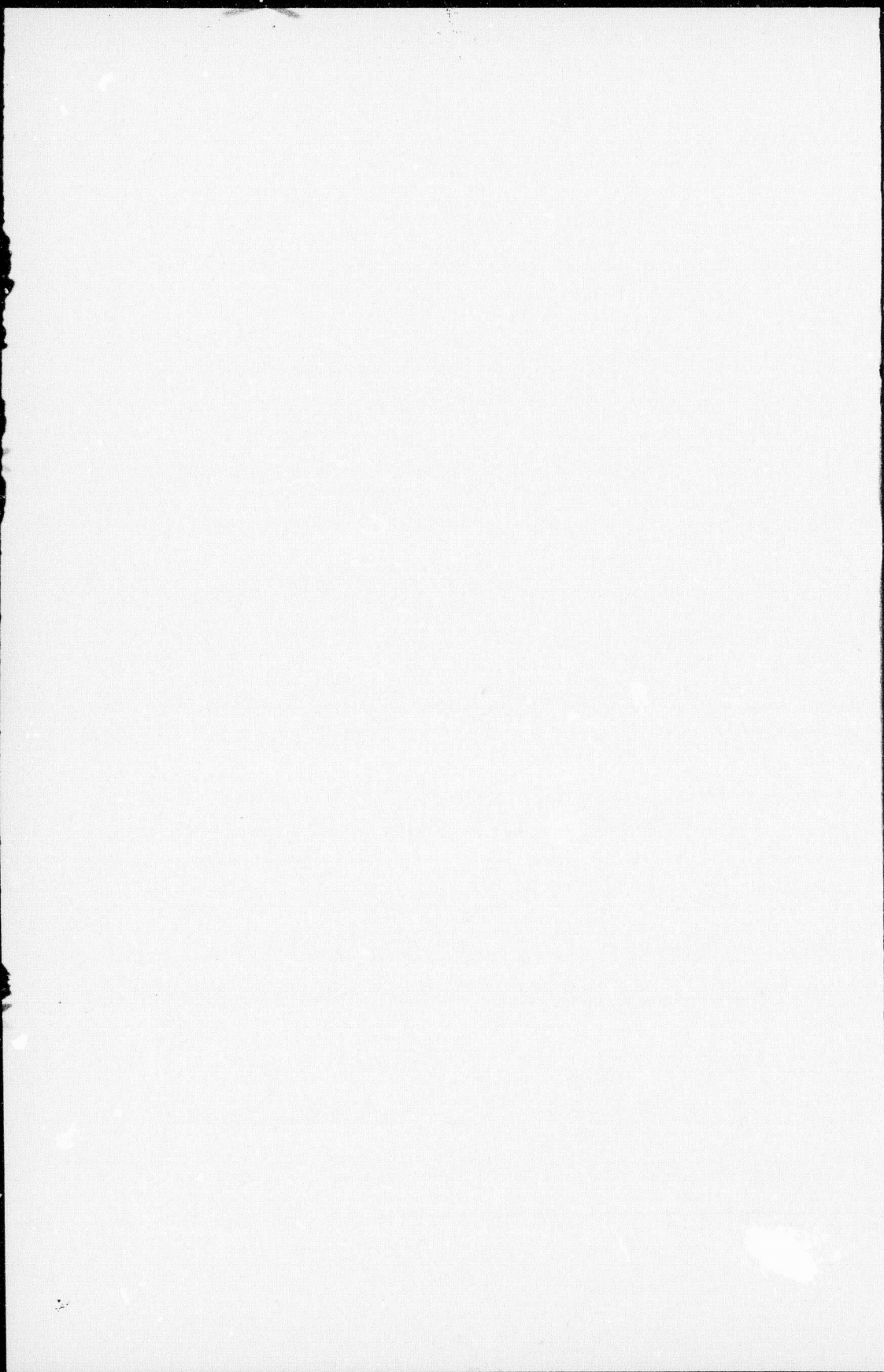
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Preliminary Statement

Hersent's counsel have set forth in the answering brief a lengthy discussion of various principles of marine insurance law. The brief's exposition, however, becomes seriously flawed where it tailors the law and facts to suit its arguments. The more glaring of the inaccuracies and misstatements are highlighted hereunder, but, as not all of them have been addressed, Continental does not wish this Court to take as accepted by Continental any portions of Hersent's brief not specifically refuted herein.

POINT I

The Storm and Heavy Weather Plan is not ambiguous, constitutes a set of express warranties, and was in effect.

Hersent in 1972 was an international marine construction company with projects located all over the world (Miller, 92a-93a; Green dep. 193a). It had employed Robert J. Green for about twenty years as Project Manager in various marine construction projects (Miller, 92a-93a).

Hersent's experienced insurance broker, Armitage & Co., Inc., was instrumental in placing the coverage (Jnt. Ex. Vol. 63, 69; Smith, 66a). Particularly, the typewritten clauses, which included the Storm and Heavy Weather Plan, were tailored to meet specific risk potentialities and, as the Plan was typewritten, it took precedence over any conflicting printed clauses. *Hagan v. Scottish Ins. Co.*, 186 U.S. 423, 429 (1902). See also: *Bluewaters, Inc. v. Boag*, 320 F. 2d 833, 835 (1st Cir. 1963) (footnote No. 4) (that typewritten additions normally prevail if there is a conflict with printed provisions is well established).

Hersent was not a neophyte engaging for the first time in maritime construction projects. It knew what it was doing. Other than Hersent's counsels' picking apart word by word in legalistic terms, there is nothing in the record to suggest that the parties to the Hull Policy did not fully understand the intent of the warranties and the obligations imposed upon each. A policy of insurance must be interpreted "according to its ordinary acceptance among the class between whom the documents pass, unless by usage it has acquired a wider or narrower interpretation among men of that class." 2 *Arnould on Marine Insurance* (14th ed.) 637.

The warranty plan was agreed to by parties experienced with and knowledgeable of the marine risks involved. It is written in seamen's language and is couched in terms and words of obligation, specifically:

"In respect to the barge 'Hughes #136' it is *warranted* by the Assured that all of the conditions set forth in the Storm and Heavy Weather Plan attached and forming part of this policy *will be strictly adhered to and complied with*.

* * *

CONDITION B:

* * *

3. Aft mooring lines *will be* slacked off enough to allow vessel to swing head into the seas and swells for better riding. If possible, vessel *will be* allowed to ride to head line moorings and anchor with fairly equal strain on each unit.
4. An alert *will be* given for tugs to stand-by in case conditions become unduly severe and assistance be required." (Emphasis supplied)

In the context of standard definitions, the Plan does set forth warranties. "Warranty" is defined in New York's *Insurance Law* §150(1) as follows:

"The term 'warranty' as used in this section, means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract."

The British *Marine Insurance Act, 1906*, 6 Edw. 7, c. 41, has the following to say of warranties:

"33. Nature of warranty

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

* * *

"35. Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith."

Express warranties are discussed in *G. Gilmore & C. Black, The Law of Admiralty* (2nd ed. 1975) as follows at page 67:

"Any fact whatever may be made the subject of an 'express warranty'—that is, the initial or continued validity of the policy may be made conditional on the existence of any state of facts. Such a warranty, to be effective, must somehow be expressed in the actual policy, but the words 'warrant' or 'warranty' need not be used. Whether a given sentence or phrase in a policy is to be given the effect of a warranty must therefore be referred to the 'intention of the parties.' Generally, any assertion of fact in the policy, whether in the main body or on the margins, is likely to be treated as a warranty of the fact asserted. Once a warranty is spelled out, the fact must be and remain exactly in conformity with the warranty, or the policy is voided."

The "intention to warrant" is expressed in the preamble to the Storm and Heavy Weather Plan itself (Jnt. Ex. Vol. 57). No witness came forward on behalf of Hersent to claim a contrary intention.

Hersent's brief (at page 30) states that the trial court concluded that Condition "B" of the Storm and Heavy Weather Plan "never came into effect," citing Conclusion of Law No. 10 (Jnt. App. 241a-242a). That Conclusion of Law makes no such explicit finding. It only deals with the preamble to Condition "B" and the first paragraph of its four paragraphs. With respect to the storm, the Conclusion of Law states that the eastern segment of the storm was "well offshore." Judge Goettel's Finding of Fact No. 25 (Jnt. App. 233a) states that the eastern offshore low-pressure center had become the dominant one by the time it reached the latitude of Long Island Sound. In any event, well prior to the storm's arrival in eastern Long Island Sound, the northeasterly gale warning had been issued (FF 39, Jnt. App. 236a). The "alert condition" had been

triggered and the heavy swells referred to in the preamble to Condition "B" later developed (Wildner, 177a). The warranties were in effect at the time of the capsize.

POINT II

Hersent breached Condition "B3" in the Storm and Heavy Weather Plan in that it improperly moored the barge.

When the crew left the barge at approximately 9:45 AM on December 15, it was rigidly fixed in a north/south direction by a 4 point mooring system.

"When we were working, we would be right up immediately adjacent to the structure.

We winched back and drew the lines tight and set the locking dogs on the winches.

* * *

Q. At the conclusion of the day, in what general compass directions would the barge have been located on the evening of the 14th A. North and south." (Green dep. 198a).

* * *

Q. From the close of business on the 14th to the time you departed the barge on the 15th, had anything been done to change the mooring lines? A. No." (Green dep. 205a).

* * *

"Q. If the winds were from the east, north, west or south or any other quadrant could it swing with that mooring arrangement? A. The barge could not tail very much with that mooring arrangement. It was quite fixed in position. Normally on a mooring, any

floating ship or barge or whatever, will tend to find the easiest position to ride, by swinging around a bit on its anchor line. If you do (287) restrict that motion, you possibly can induce heavier rolling and more problems." (Smith, 73a).

* * *

"The Court: Can you recall whether any particular attention was taken to the mooring lines so that the vessel swung into the seas?

The Witness: I do remember the lines being taut that mooring or left taut.

* * *

The Court: And no attempt was made to loosen the lines to allow the vessel to swing so it would face the wind?

The Witness: Like a ship's bow?

The Court: Yes.

The Witness: No.

The Court: Do you know whether that was ever done? Did they ever loosen it up so it would swing like a ship into the wind?

The Witness: Not to my knowledge." (Doyle, 151a).

* * *

"The Court: When you secure and moor in this manner, you prevent the vessel from turning itself into the wind, do you not?

The Witness: That is correct.

The Court: That means you are going to take the seas broadside if the wind comes from east to west?

The Witness: East to west, that's right.

The Court: In fact, if it comes from the northeast or the northwest you are getting quartering

waves which will come over the barge, also, is that correct?

The Witness: Yes." (Wilder, 169a).

There is no doubt that the manner in which the barge was moored at the time of the capsizing prevented it from swinging its head into the predicted winds as they shifted from the east, out of which they were coming on Friday (Doyle, 151a), through north to northwest. This breached the warranty.

During the trial the court commented (Jnt. App. 142a-143a) as follows:

"(615) The Court: That is fine. I notice a singular lack of answer to my question about your position as to the (616) mooring lines.

Mr. Gillers: We haven't had our thirty seconds, your Honor.

The Court: In my opinion that is your Achilles heel vis-a-vis the conditions.

Mr. Gillers: If in fact the warranty is a warranty, if it was in effect, and if the Inchmaree argument is not successful, then we have to deal with the substantive factual issue, your Honor.

The Court: That is what I am submitting to you, and I am wondering what your position is on that factual aspects. I think you are in a much stronger position with the boom than you are with No. 3.

Mr. Warner: I agree. I think we definitely are reluctant to reach the heel, no doubt about that. But our position with regard to 3, your Honor, is that there was no reason on Thursday to do Condition 3 because it was flat and calm—

The Court: There was reason on Friday, and there was no great problem involved in slacking off the aft lines. You had fourteen hundred feet of cable

on the drum. It was only 100 to 150 out. It wouldn't have taken but a few minutes to slack off the rear lines.

Mr. Warner: Part of our contention is, (617) your Honor, when it did become reason to do it, the only forecast for a northeast storm was an hour and fifteen minutes after everybody was off the barge. That would be No. 1.

No. 2, the position of the entire barge would have had to be been changed because the position of the barge on Thursday, when the workers got there on Friday, was based upon the flat and calm conditions placing it close to the platform, so that had there been this slacking off so that there could have been movement, the platform itself would have been damaged.

The Court: Not necessarily. They could have slacked off on the rear maybe as much as five hundred or seven hundred fifty feet, without allowing enough swing for a southerly wind to bring the barge toward the construction site. Moreover, nobody even suggested the possibility of southerly winds. Southerly winds across Long Island would not be terribly strong and would not be anticipated at that time of the year. The long and short of it is there is nothing in the record to explain why Green left the shore side mooring lines in such a tight crossed condition.

• • •"

Hersent raises a spurious issue as to which were the bow and the stern ends of the barge *out* of the context of the Storm and Heavy Weather Plan and it was this approach which confused the trial judge. Counsels' argument concerning "confusion" as to which were the bow and stern ends and the trial courts related comments are inapposite in the context of the Plan. The Plan never used the words

"bow" and "stern." Further, the undisputed testimony is that the body of the crane was on the bow and it was this end, the bow, that was moored to the north and toward the platform (Smith, 71a). The Plan only required that the barge (whose bow and stern were identical in construction) be moored to allow the "vessel to swing head into the seas and swells for better riding," which seas and swells were expected to come from the northeast (Zeltmann, 58a-59a). The aft (in fact, the stern) lines were taut, only 100 and 150 feet long, and prevented the barge's head from swinging into the swells.

Hersent's brief is flatly wrong in stating (at page 34) that "[t]he record supports a finding that the aft mooring lines were sufficiently slack"—and makes no citation to the record in support of this assertion. All of the evidence is to the contrary (Green dep. 198a; Doyle, 151a; Carr dep. 217a-218a).

Judge Goettel commented (Jnt. App. 172a), that, if the southerly wires were slacked off, the northwesterly wire might rub against pilings near the construction site and rejected that argument during the trial. (See page 9 herein). But this mooring position was not the only one available to the barge. The tug PAUMANOK had been used on prior occasions for setting the barge on anchors, shifting the barge on its anchors, running a hauser to mooring buoy No. 1, retrieving anchors, and shifting anchors for the barge (Jnt. Ex. Vol. 16, 13, 35, 45, 48, 49). It was possible to moor the barge so that the northwesterly wire would not rub against pilings. Even if it were impossible to do so, Hersent would be barred from recovery for failure to comply with the warranty. *Continental Sea Foods, Inc. v. New Hampshire Fire Ins. Co.*, 1964 A.M.C. 196, 200-201 (D.C.S.D.N.Y. 1963).

POINT III

Hersent breached condition "B4" in the Storm and Heavy Weather Plan in that no tugs were on stand-by alert at the times required.

Mr. Green did in fact give an alert for the tug to "stand-by" on Saturday, December 16, and the tug PAUMANOK was manned between the hours of 7:00 a.m. and 3:00 p.m. However, from the hours of 3:00 p.m. on Saturday and until the vessel was found capsized at approximately 7:00, 8:00 a.m. on Sunday morning, December 17, there were, in breach of the express warranty, *no tugs* "standing by."

Hersent contends (at page 35 of its brief) that Captain Wildner's keeping "an eye on the weather conditions" at Mattituck Inlet and observing the barge from the shore through binoculars constituted "standing by" in the context of Condition "B4"'s requirement that:

"An alert will be given for tugs to stand-by in case conditions become unduly severe and assistance be required."

A "stand-by" is defined at 81 C.J.S. 847 as follows:

"One who or that which stands by one in need; one to be relied upon either for regular use or for an emergency; something quickly available for use."

Captain Wildner answered affirmatively when Judge Goettel asked him (Jnt. App. 172a):

"One of the purposes, if not the major purpose of your standing by on Saturday, was to be able to go to the assistance of the barge in case it showed it was having trouble, is that correct?"

By Saturday, however, the tug PAUMANOK had become landlocked by the storm in the inlet and its crew was discharged for the weekend at 3:00 p.m. Judge Goettel found that the barge capsized while moored at its work site between 5:00 p.m., Saturday, December 16, and 8:00 a.m., Sunday, December 17, 1972. There was no tug standing by—in any sense of the word—between 3:00 p.m., Saturday, December 16 and 8:00 a.m., Sunday, December 17. Had the tug PAUMANOK been manned and moored at Buoy Mike at the construction site, it would have been otherwise.

The crew boat TRACY MILLER was used to transport the workers between the shore and the offshore job site (FF 40, Jnt. App. 236a). Its other functions included towing and moving anchors (Mayer dep. 181a). It could have maneuvered its way out to the barge on Friday afternoon as easily as could have the tug PAUMONAK (FF 42, Jnt. App. 236a).

Hersent argues (brief page 35) that it would have been dangerous to put men back aboard the barge on Friday, December 15, after the northeast gale warning had been issued (as of 11:00 a.m.). The sea condition existing in eastern Long Island Sound on Thursday, December 14, was a flat calm (Mayer dep. 189a; Green dep. 197a; Def. Ex. M, Jnt. Ex. Vol. 89). When the crew was taken off the barge the following morning, Friday, December 15, the wind was from the east and had built to only 20 knots (FF 35, Jnt. App. 236a). There was no difficulty encountered by the crew getting off the barge that Friday morning (Carr dep. 219a). At the more exposed Falkner Island Light Station the wave height was between three and four feet (Def. Ex. M., Jnt. Ex. Vol. 89).

Continental asks this Court of Appeals to take judicial notice that the distance from the barge's work site to the

Long Island shore *due eastward* was about three nautical miles. *Federal Rule of Evidence* No. 201. Chart No. 12358 (which was admitted into evidence at trial transcript page 43 but not marked into evidence by the courtroom clerk) will be exhibited to the Court at oral argument. This chart shows the work site to be protected by the north fork of Long Island from an east wind. Continental submits that the waves that built up over this three-mile stretch of water induced by an east (or even a bit north of east) wind could not have amounted to much during the middle of the day on Friday, December 15. There was a secure lee on the westerly side of the 135 foot barge (Wildner, 167a-168a).

Again, even assuming "impossibility," this would not be a defense for Hersent. *Continental Sea Foods, Inc. v. New Hampshire Fire Ins. Co.*, 1964 A.M.C. 196, 200-201 (D.C.S.C.N.Y. 1963).

POINT IV

Hersent in fact never designated Green as the individual responsible for implementing the Storm and Heavy Weather Plan.

Hersent's counsel argued successfully before the court and again in its reply brief that Green had been appointed by Hersent as the individual responsible for ascertaining the weather conditions and for determining the mooring arrangements. There is no testimony in the record to support that finding. Neither Green nor Miller ever testified to that effect. More importantly, the record is devoid of any testimony that Green or Miller ever saw the insurance policy prior to the loss. In fact, it is more than reasonable to conclude that Green knew nothing of

the terms and conditions of the insurance policy, and more particularly, of the Storm and Heavy Weather Plan.

"Q. I believe you also had, in effect, an insurance policy known as a hull insurance policy on the Hughes #136, is that correct, if you know? A. I think so, yes.

Mr. Reedy: We will so stipulate.

Q. Did you have anything to do with the obtaining of that policy of insurance? A. Personally, no" (Green dep. 225a).

While this is not dispositive of the issue, the "I think so" suggests that he had never seen it.

POINT V

Hersent breached an implied warranty of seaworthiness.

Hersent is misleading where it states (brief pages 37 and 38) that:

"There is no implied warranty of seaworthiness in a time insurance policy."

* * *

"The English rule is that a warranty of seaworthiness will not be implied in a time policy."

Continental's brief (page 19) cites contrary authority from American jurisprudence. The English rule, set forth in Section 39(5) of *Marine Insurance Act, 1906*, 6 Edw. 7, c. 41, reads as follows:

"(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage

of the adventure, *but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*" (Emphasis added)

See: *Pacific Queen Fisheries v. Symes*, 307 F.2d 700, 711-713 (9th Cir. 1962), cert. den. 372 U.S. 907 (1963).

Hersent, at page 40 of its brief, limits its contention somewhat by stating that ". . . in the Second Circuit, there is no implied warranty of seaworthiness in a time policy." This is refuted by Chief Judge Mishler in *Neubros Corp. v. Northwestern Nat. Ins. Co.*, 1972 A.M.C. 2443 (D.C.E.D.N.Y. 1972) wherein he says at page 2450:

"Just as the warranty of seaworthiness is implied in every charter unless expressly waived, so it is implied in every hull policy of insurance unless expressly waived. *McAllister Lighterage Line Co. v. Insurance Co. of North America*, *supra*, 1957 A.M.C. at 1779, 244 F. (2d) at p. 871. The argument that such warranty is implied in voyage hull policies but not in time hull policies is not supported by American case law. It is well established that the warranty of seaworthiness attaches to a time hull policy at the time the policy becomes effective. *Henjes v. Aetna Insurance Co.*, 1943 A.M.C. 27, 132 F. (2d) 715, *Tropical Marine v. Birmingham Fire Ins. Co.*, 1957 A.M.C. 1946, 247 F. (2d) 116, 119 (5 Cir., 1957), cert. denied, 355 U.S. 903."

On Tuesday, December 19, 1972 Captain Smith, of Hull & Cargo Surveyors, Inc., proceeded out to the capsized barge in the crew boat to receive a first-hand report from the diver. As reported later by Captain Smith (Pls. Ex. 7 p. 4):

"The diver's *initial* report was that one hatch cover was missing, one hatch cover was hanging on a

chain and that four hatch covers were loose." (Emphasis added)

Given the time of year and the weather conditions, that the divers did not at that time make a complete examination of the capsized barge is not surprising.

"Q. Did the diver report any other damage to the barge to you upon his, immediately following his inspection? A. He *did not make a detailed inspection* and he reported no visible large tears or indentations in any manner." (Green dep. 224a). (Emphasis supplied).

We do not know if other hatch covers were subsequently found loose, but this finding of at least six loose or missing hatch covers is consistent with the court's finding that the barge took on substantial amounts of water prior to capsizing; for, as the barge was otherwise watertight, this water could only have entered through the open hatch covers.

Hersent produced no proof that these hatch covers were damaged or that there was any indication that they had been ripped loose immediately before or during the capsizing. Accordingly, it is clear they were not secure prior to the capsizing and the barge was, therefore, unseaworthy. The court found that this was at least one of three contributing factors of the vessel's capsizing. Curiously, Hersent's own expert, Freelund, testified he could not rule out the possibility that the entry of the water *alone* caused the vessel to capsize (Freelund, 113a). It is reasonable to assume that, since Hersent took no regular precautions to secure the hatch covers, they were left open when the crew left on Friday, December 15.

The Court: How often were the watertight hatches to the compartments secured? How often were they checked and tightened?

The Witness: There was no frequency of procedure on tightening hatches to my knowledge. They weren't paid exclusively attention to if that is what you mean. In other words, they could have been left loose or they could have been left open." (Doyle, 150a).

Green claimed that he had looked at the hatches prior to leaving on Friday, December 15. He stated he found they were closed. Since Green, the Project Manager, who was in "privy" with the owner, claimed he checked them, his failure to ascertain that they were loose and not secured is "negligence" and made the vessel unseaworthy. *Tropical Marine Prod. v. Birmingham Fire Ins. Co. of Pa.*, 247 F. 2d 116 (5th Cir. 1957), cert. den. 355 U.S. 903 (1957).

Hersent contends (page 42 of its brief) that the Inchmaree clause insures against unseaworthiness. Although this may be true regarding "latent defects," it is not true with respect to the missing and loose hatch covers which were readily discoverable by the shipowner or one in "privy" with the shipowner, i.e., Project Manager Green. *Tropical Marine, supra*, at 247 F.2d 120-121.

POINT VI

Project Manager Green was not acting as Master in the operation of Barge 136 at the time that it capsized.

Cases involving the Inchmaree clause are collected at 98 A.L.R. 2d 952-962 (*Anno: What constitutes want of due diligence by insured or owner so as to bar recovery under Inchmaree clause of marine policy*). Continental's counsel have been unable to find a precedent for Judge Goet-

tel's conclusion that a Project Manager, who was a construction engineer (Brush, 91a; Miller, 92a-93a) rather than a seaman, was the "Master" of an unmanned vessel. Project Manager Green was at home (Green, 192a) during the barge's time of need and there is nothing in the record to show that Green exercised the traditional functions of a nautical Master having a sole vessel under his command.

POINT VII

Continental agrees that Hersent had the initial burden of proving that its loss resulted from a peril insured against under the Hull Policy but contends that Hersent's use of "exception" in its brief is a misnomer.

As stated in *Northwestern Mutual Life Insurance Co. v. Linard*, 498 F. 2d 556 (2nd Cir. 1974), at page 561:

"The burden of proof generally is on the insured to show that a loss arose from a covered peril . . . It is, of course, prerequisite to the liability of the underwriter, under either the general perils clause or the special coverage ["Inchmaree"] clause, that the loss be 'proximately' caused by the peril insured against and claimed under." (Citations omitted)

The burden of proof, or rather risk of non-persuasion, is cast on the shipowner basically because it has more information more readily available. *Linard, supra*, page 562.

Hersent's brief (p. 13) mistakenly ties Continental's defenses to purported "exceptions" to coverage in the Hull Policy. An "exception," in insurance parlance, is an exclusion of one or more risks and its object is to exclude

that which otherwise would be included. *Black's Law Dictionary* (4th ed. 1951), p. 667. An example of an "exception" would be an express exclusion of war risks from the coverage of an all risks policy. See: *Pan American World Air, Inc. v. Aetna Cas. & Sur. Co.*, 505 F. 2d 989 (2nd Cir. 1974).

Hersent's approach masks the true nature of Continental's defenses. None of the express warranties in the Storm and Heavy Weather Plan is an "exception"; nor is the *implied* warranty of seaworthiness; and the "due diligence" clause of the Inchmaree clause (Jnt. Ex. Vol. 54) is a proviso rather than an "exception." Compliance with the warranties by Hersent was a condition precedent to liability on the part of Continental (Continental's opening brief p. 11) and it was Hersent's burden to show compliance. The burden was also upon Hersent to exclude unseaworthiness, resulting in the flooding of some of the barge's compartments, as the cause of the capsizing in claiming that the capsizing resulted from an insured peril, *Continental Ins. Co. v. Patton-Tully Transp. Co.*, 212 F. 2d 543 (5th Cir. 1954), at least where such unseaworthiness is not shown to be underwritten by a specific section of the Inchmaree clause or where such Inchmaree coverage has been knocked out by application of the "due diligence" proviso. Where a ship sinks because of unseaworthiness, it has not been lost by a peril of the sea. *Read v. Agricultural Ins. Co.*, 219 Wis. 580, 263 N.W. 632, 635 (1935).

Continental agrees with Hersent that, apart from the application of the express warranties in the Storm and Heavy Weather Plan, "this case may depend as much on the absence as the presence of evidence" (Hersent brief p. 13). In approaching resolution of the burden of proof issues, care must be taken to distinguish a "question of causation" from an "affirmative defense." Cf. *Northwestern Mutual Life Insurance Co. v. Linard*, 498 F. 2d 556, 563 (2nd Cir. 1974).

CONCLUSION

The judgment below should be reversed and judgment should be granted in favor of plaintiff-appellant.

Respectfully submitted,

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W. SHELBY COATES, JR.
Of Counsel

In The

United States Court of Appeals for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

~~NEW YORK SUPREME COURT APPELLATE DIVISION~~~~DEPARTMENT~~

The Continental Insurance Company

Plaintiff-Appellant

against

Hersent Offshore Inc.,

Defendant-A pellant

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Macklin Hannan & McKernan Esqs.

being duly sworn,

deposes and says that he is over the age of 21 years and resides at
11 Park Place New York, New YorkThat on the 3rd. day of June 1977
500 5th. avenue New York, New York
he served the annexed Reply Brief

at

upon

Warner & Gillers Esqs.

in this action, by delivering to and leaving with said attorneys

3 true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 3rd.

day of June 1977

ROLAND W. JOHNSON

Notary Public, State of New York
No. 4509705Qualified in Delaware County
Commission Expires March 30, 1979

